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Maine Labor Relations Board Annual Report, Fiscal Year 1995

Maine Labor Relations Board

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ANNUAL REPORT

MAINE LABOR RELATIONS BOARD

Fiscal Year 1995

This report is submitted pursuant to 26 M.R.S.A. §§ 968(7) and 979-J(1).

Introduction

The major customer service initiative begun by the Maine Labor Relations Board during the fiscal year was development of a plan to provide Internet access to the full text of the Board's decisions and rules and the statutes which it administers. As with all types of legal research, review of earlier Board decisions helps public employers and bargaining agents to understand the law, thereby avoiding litigation or facilitating resolution of those disputes which do occur. Board decisions from 1970 through 1988 are accessible through the *Topical Index and Decision Abstracts*. While these volumes were a valuable product, the Board was unable to continue updating them due to staff reductions.

In early August, the Board convened a users' group consisting of representatives of its major customers for the purpose of exploring alternatives to the *Index and Abstracts*. The result of the discussion was that all of our customers, whether they use DOS-based or Macintosh hardware, could be served through the Internet. The University of Maine currently maintains a free public access gateway to the Internet ("URSUS") and they are very interested in providing public access to Maine State Government information through their system. This approach utilizes hardware and telecommunications equipment that is currently publicly owned and, because the University has a presence in diverse locations throughout Maine, most Mainers can access URSUS through a toll-free phone call. A good deal of preliminary work has been accomplished and the Board hopes that some of its information will be on-line within the next few months.

During the past year, the Board had requests for services from most segments of the public sector that have statutorily conferred collective bargaining rights. As will be noted later in this report, there were substantial fluctuations in the Board's activities compared to the previous year. While there was a decrease in the number of prohibited practice complaints filed, there was an increase in representation activity this year. Reversing a 4-year trend, there was an increase in the number of voluntary agreements on new bargaining units filed. In the dispute resolution area, the number of mediation requests received declined from the high level witnessed last year and there was a

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moderate decrease in both the number of fact-finding requests received and the number of fact-finding hearings conducted. Overall, the work load of the Board was not as heavy as in FY 1994.

As in past years, the staff of the Board handled a great many inquiries from public employers and employees or their representatives, the media, and members of the public. The staff continues to be a primary source of information for persons interested in the operations and procedures of Maine's public sector labor laws. In those instances that involved matters over which the Board has no jurisdiction, the staff continued the policy of providing some orientation for the inquirer, suggesting other agencies or organizations that might be of help, and making appropriate referrals.

Public Chair Peter T. Dawson of Hallowell, Alternate Public Chairs Kathy M. Hooke of Bethel and Pamela D. Chute of Brewer, and Alternate Employee Representatives Wayne W. Whitney of Brunswick and Gwendolyn Gatcomb of Winthrop, continued to serve in their respective capacities throughout the year. All of the Board members, the staff, and the labor relations community as a whole, were saddened by the death of Primary Employee Representative George W. Lambertson, on February 9, 1995. Mr. Lambertson was first appointed to the Board by Governor Brennan in 1985 and was reappointed by Governor McKernan in 1989 and 1994. He was a very dedicated and hard-working member who will be missed. In October 1994, Governor McKernan reappointed Primary Employer Representative Howard Reiche, Jr., of Falmouth and Alternate Employer Representative Eben B. Marsh of Denmark to new four-year terms. The Governor also appointed Karl Dornish, Jr., of Winslow to serve as an Alternate Employer Representative, replacing Jim McGregor, a member since 1988 who decided not to seek reappointment. The three nominations were confirmed by the Legislature on November 14, 1994.

Legislative Matters

The Board did not submit any legislation during the First Session of the 117th Legislature. Several bills affecting the collective bargaining statutes were introduced, but not enacted, including: three separate measures to extend the scope of binding interest arbitration to include the topics of wages, pensions and insurance; one which would have extended the Board's jurisdiction to employees having less than six months' tenure; and one which would have required that the state's general fund pay for the first three days of

mediation (currently all mediation services are funded through user fees paid by the parties).

One bill, L.D. 926, was carried over to the next legislative session. As drafted, this measure would avoid impasse in public sector negotiations. The bill provides that should the parties be unable to reach agreement after interest arbitration, either party could request the services of a member of the Panel of Mediators and that the mandatorily negotiable subjects included in the expired collective bargaining agreement could only be changed by express agreement of the parties.

Bargaining Unit and Election Matters

During fiscal year 1995, the Board received 28 voluntary or joint filings for the establishment of or change in collective bargaining units. There were 18 filings in FY 94, 23 in FY 93, 27 in FY 92, 41 in FY 91 and 54 in FY 90. Of the 28 FY 95 filings, 5 were for educational units, 20 within municipal or county government, 1 concerned Judicial employees and 2 concerned State employees.

Seventeen (17) unit determination or clarification petitions (submitted when there is no agreement on the composition of the bargaining unit) were filed in FY 95: 9 were for determinations, and 8 were for clarifications. Two of the new unit filings actually went to hearing and decision, agreements were reached in 8 cases, 3 were withdrawn, and 4 are pending. Once a unit petition and response are filed, a member of the Board's staff, other than the assigned hearing officer in the case, contacts the parties and attempts to facilitate agreement on the appropriate bargaining unit. This involvement, successful in 47% of the cases this year, saves substantial time and litigation costs for public employers and bargaining agents. There were 16 unit filings in FY 94, 12 in FY 93, 15 in FY 92, 59 in FY 91 (35 concerning State employees), and 36 in FY 90.

After the scope and composition of the bargaining unit is established, either by agreement or by unit determination, a bargaining agent election is conducted by the Board to determine the desires of the employees, unless a bargaining agent is voluntarily recognized by the public employer. During FY 95 there were 5 voluntary recognitions filed. Fifteen (15) bargaining agent election requests were filed in FY 95; 10 elections were actually held, 1 request was withdrawn, and 4 matters are pending. In FY 94, there

were 6 voluntary recognitions filed, 14 bargaining agent election requests received, and 5 elections held.

In addition to representation election requests, the Board received 2 requests for decertification/certification. These petitions involve a challenge by the petitioning organization to unseat an incumbent as bargaining agent for bargaining unit members. Both requests resulted in elections being held.

The Board received 1 straight decertification petition in FY 95. No new union is involved in these petitions; rather, the petitioner is simply attempting to remove the incumbent agent. An election was held in response to the petition in which the incumbent union retained its status as the bargaining agent.

There were 4 election matters carried over from FY 94. Consequently, there were 22 such matters requiring attention during the fiscal year; this compares with 22 in FY 94, 20 in FY 93, 21 in FY 92, 44 in FY 91, and 61 in FY 90.

Dispute Resolution

The Panel of Mediators is the statutory cornerstone of the dispute resolution process for public sector employees. Its importance continues to be reflected in its volume of activity and in its credibility with the client community. The activities of the Panel are summarized in this report and are more fully reviewed in the Annual Report of the Panel of Mediators.

The number of new mediation requests received during the fiscal year declined substantially. There were 77 new requests filed this year compared with 114 in FY 94, 115 in FY 93, 94 in FY 92, and 89 in FY 91. In addition to the new mediation requests received during FY 95, there were 34 matters carried over from FY 94 that required some form of mediation activity during the year. Thus the total number of mediation matters requiring the Panel's attention in this fiscal year was 111, compared to 151 in FY 94. At least part of the reason for the decline in the number of mediation filings is a trend noted in last year's report. During the downturn in the regional economy of the last three years, most parties were opting for one-year agreements, hoping that more favorable conditions would prevail the following year. As a result, many more agreements expired in each of the last two years than would normally be expected. Beginning in mid FY 1994, parties

began negotiating multi-year agreements; therefore, fewer contracts expired this year than during the past two years.

One disturbing development this year is the significant drop in the settlement rate achieved for matters where mediation had been concluded this year, including carryovers from FY 1994. During the preceding five years, the settlement rate ranged from a low of 68.4% to a high of 79%. The mean was 74.94%. This year the settlement rate was only 50%. Anecdotal evidence from the mediators and partisan representatives suggests that this decline may be due to employee frustration over earlier concessions and an attempt to "catch up" this year, combined with substantial taxpayer resistance to higher taxes at all levels of government (the latter translating into management proposals for further concessions during current negotiations).

Since both new filings and cases carried over from prior years contributed to the actual work load of the Panel in the course of the twelve-month period, we have reported settlement figures that represent all matters in which mediation activity has been completed during the reporting period.

Fact finding is the second step in the three-step statutory dispute resolution process. In fiscal year 1995 there were 20 fact-finding requests filed. Those requests represent a decrease of 23 percent from last year's level. Three (3) petitions were withdrawn or otherwise settled, 7 requests went to hearing, 9 petitions are pending hearing, and the parties waived fact finding in one case and proceeded directly to interest arbitration. Last year 14 fact-finding hearings were held.

Interest arbitration is the third and final step in the statutory dispute resolution process. Under the provisions of the various public employee statutes administered by the Board and unless agreed otherwise by the parties, an interest arbitration award is binding on the parties on non-monetary issues. Salaries, pensions and insurance are subject to interest arbitration, but an award on these issues is only advisory. In recent years the Board has received few interest arbitration requests, and in FY 95 it received only 1. One interest arbitration request was received in FY 94. None were filed in the preceding three years. Although the public statutes require that arbitration awards be filed with the Board, they usually are not. This year, only one interest arbitration report was received. While we assume that this was the only interest arbitration award issued in the public sector

during the year, it may be that parties have simply failed to provide proper notification to the Board.

Prohibited Practices

One of the Board's main responsibilities is to hear and rule on prohibited practice complaints. Formal hearings are conducted by the full, three-person Board. Seventeen (17) complaints were filed in FY 95. This represents a decrease from both the FY 94 level and from the number of filings in each of the past five years. During that time, the number of complaints filed each year have fluctuated from a low of 19 to a high of 38, with the average being 33. Many of the complaints received during the past year charge violations of the duty to negotiate in good faith.

In addition to the 17 complaints filed in FY 95, there were 22 carryovers from FY 94, compared with 45 complaints and 23 carryovers last year. Board panels conducted 8 evidentiary hearings during the year, compared with 15 in FY 94. Board members sitting singularly as prehearing officers held conferences in 9 cases, compared with 21 in FY 94. In 9 matters, the Board issued formal Decisions and Orders. One matter has been deferred pending grievance arbitration proceedings. Four cases have been continued indefinitely at the request of one or both parties and three have seen no action by a party for over a year and a half. Such a continuance, or inactivity, usually indicates that the parties are attempting to resolve their differences, even though a complaint has been filed to preserve the complainants' rights, given the Board's six-month statute of limitations. Three complaints await both prehearing and hearing. Seventeen (17) complaints were dismissed or withdrawn at the request of the parties. Such requests generally occur after the parties reach a contract when the complaint is related to contract bargaining. No cases were dismissed by the executive director, although one was dismissed by a prehearing officer.

Appeals

Two unit clarifications by Board hearing examiners were appealed to the Board. One appeal has been denied by the Board and one is pending. The Board participated in three cases decided by the Supreme Judicial Court this year.

The Supreme Judicial Court issued four decisions in appeals from Board orders during the fiscal year. The Board was a party and presented argument in support of its

decision in the first three cases discussed below. In Bureau of Employee Relations v. Maine Labor Relations Board, 655 A.2d 326 (Me. 1995), the Court held that, since a shutdown in state government was unlikely to recur and since the employer had complied with the Board's order, the question of whether the employer should have complied with the layoff and recall provisions of relevant collective bargaining agreements was moot. In so doing, the Court vacated a judgment of the Superior Court which had, in turn, vacated the Board's order.

The second case involved the City of Bangor and the Bangor Firefighters Association. The Board had held that, although the City was not required to negotiate with the bargaining agent on whether retirees would be in the same health insurance pool as the active employees, it would have to negotiate over the impact, if any, of retiree placement decisions upon the insurance premiums paid by unit employees. Reasoning that, if the City could make a decision unilaterally without violating its duty to bargain collectively, it should not be required to negotiate over the impact of such decision, the Superior Court reversed the Board's order. The Supreme Judicial Court reaffirmed the Board's long-standing impact bargaining rule and vacated the judgment of the Superior Court. City of Bangor v. Maine Labor Relations Board, Law Docket No. PEN-94-496 (May 25, 1995).

The third case involved the University of Maine System. The Board had held, consistent with a new interpretation of the law first adopted in 1991, that wage escalator provisions in expired collective bargaining agreements must be followed. The Superior Court reversed the Board on policy grounds. In Board of Trustees of the University of Maine System v. Associated COLT Staff of the University of Maine System, Law Docket No. Ken-94-445 (May 26, 1995), the majority of the Court cited the long-standing labor law principle that the duty to negotiate in good faith includes the obligation to maintain the *status quo* following the expiration of a contract. The Court noted that, since the Board had adopted its new interpretation only after the parties negotiated the contract at issue, the parties could not have had the new "rule" in mind when they reached their agreement. The majority went on to hold that the Board's interpretation was contrary to the intent of the labor relations law that the duty to negotiate does not require either party to make particular concessions or agree to particular proposals. The Court struck down the Board's interpretation as being tantamount to requiring the employer to grant wage increases to

which it had not agreed. Chief Justice Wathen, writing for the three-member minority of the Court, opined that the Board's interpretation of the *status quo* rule was reasonable, was based on private and public sector precedent in other jurisdictions, and was not inconsistent with the relevant statutory history.

In a fourth Law Court case decided this year involving an appeal from a Board order, the Board noted that its interests in the case were not distinct or different from those of the parties and declined to participate in the appeals process. In *Mountain Valley Education Association v. Maine School Administrative District No. 43*, 655 A.2d 348 (Me. 1995), the Court affirmed the Board's holding that, if the bargaining impasse continues for a reasonable time after the statutory dispute resolution procedures are exhausted, the public employer may lawfully implement its "last, best offer" on the topics of wages, pensions and insurance. The sole dissenting member of the Court, Justice Lipez, found that the implementation was unlawful in the case presented on the grounds that the Board had failed to find that the negotiations were at impasse at the time that the employer implemented its "last, best" insurance proposal.

One appeal that was pending in the Superior Court at the end of the last fiscal year was decided this year. In *The University of Maine System v. Powers McGuire*, No. CV-94-153 (Me. Super. Ct., Ken., Cty., Oct. 11, 1994), the Superior Court affirmed the Board's conclusion that the employer had violated the duty to bargain by unilaterally changing its well-established practices regarding payment to faculty for teaching summer courses. Two other cases are currently on appeal in the Superior Court. One appeal concerns the allegedly discriminatory discharge of a police officer during negotiations. The question presented in the other case is whether the Board properly denied an attempt to amend a complaint beyond the statute of limitations, when the original timely-filed complaint had been dismissed.

Two other decisions by the Law Court this year did not grow out of controversies heard by the Board but may, nevertheless, have a significant impact on the Board's case load in the future. In *Teamsters Local Union #340 v. Portland Water District*, 651 A.2d 339 (Me. 1994) and *Maine State Employees Association v. Bureau of Employee Relations*, 652 A.2d 654 (Me. 1995), the Court held that, after expiration of a collective bargaining agreement, the employer must continue the mandatorily negotiable terms of employment at the levels contained in the expired agreement. The Court held that allegations

concerning changes in such terms arising after expiration of the agreement are not subject to a contractual duty to arbitrate and must, in the absence of an explicit agreement to arbitrate, be litigated before the Board as violations of the duty to bargain in good faith. Traditionally, public sector parties in Maine have resolved such disputes through the contractual arbitration procedure.

Summary

The following chart summarizes the filings for this fiscal year, along with the previous five years:

	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995
Unit Determination/ Clarification Requests Number filed---	36	+72% 59	-75% 15	-20% 12	+33% 16	+6% 17
Agreements on Bargaining Unit (MLRB Form #1) Number filed---	54	-24% 41	-34% 27	-15% 23	-22% 18	+56% 28
Voluntary Recognitions (MLRB Form #3) Number filed---	12	-42% 7	+43% 10	-40% 6	--- 6	-17% 5
Bargaining Agent Election Requests Number filed---	46	-28% 33	-48.5% 17	-29% 12	+17% 14	+7% 15
Decertification Election Requests Number filed---	8	-25% 6	-33% 4	-50% 2	+250% 7	-86% 1
Mediation Requests Number filed---	115	-23% 89	+5.6% 94	+22% 115	-.9% 114	-32% 77
Fact-Finding Requests Number filed---	20	+70% 34	-41% 20	+20% 24	+8% 26	-23% 20
Prohibited Practice Complaints Number filed---	19	+47% 28	+25% 35	+9% 38	+18% 45	-62% 17

As the above table indicates, the demand for the Board's different services varied during the fiscal year. Continued organizational activity and a smaller number of

decertification petitions may indicate that demand for all of the Board's services will increase in the future. As the number of organized employees approaches the complete pool of those eligible, the number of new units created each year will decline. More units means more requests for changes in unit composition, more elections to change or oust bargaining agents, a greater potential for prohibited practice complaints, and increased demand for dispute resolution services.

During FY 95, public sector labor-management relations in Maine continued to mature. Parties have increasingly relied on the statutory dispute processes to settle their differences, rather than resorting to self-help remedies. The development of more mature labor relations is evidenced by the strong demand for mediation services and the willingness of parties to settle prohibited practice cases. In sum, the Board's dispute resolution services fostered public sector labor peace throughout the fiscal year.

Dated at Augusta, Maine, this 30th day of June, 1995.

Respectfully submitted,

A handwritten signature in dark ink, reading "Marc P. Ayotte", is written over a horizontal line.

Marc P. Ayotte
Executive Director
Maine Labor Relations Board